NO. 97914-6

SUPREME COURT OF THE STATE OF WASHINGTON

GARFIELD COUNTY TRANSPORTATION AUTHORITY; KING COUNTY; CITY OF SEATTLE; WASHINGTON STATE TRANSIT ASSOCIATION; ASSOCIATION OF WASHINGTON CITIES; PORT OF SEATTLE; INTERCITY TRANSIT; AMALGAMATED TRANSIT UNION LEGISLATIVE COUNCIL OF WASHINGTON; and MICHAEL ROGERS,

Respondents,

v.

STATE OF WASHINGTON,

Petitioner.

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING REVIEW

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I. INTRODUCTION

When Washington voters enacted Initiative 976, it became "presumptively constitutional," *Pierce County v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003), and set to take effect December 5. But the trial court issued a legally flawed preliminary injunction preventing it from taking effect. Respondents now argue that it would be inappropriate for the Court to stay the injunction based on invalid procedural concerns, an inaccurate description of this Court's role, and speculative allegations of harm. The Court should see through their objections and grant the stay.

II. ARGUMENT

A. It Is Fair and Appropriate to Grant a Stay

Respondents claim that it would be "unfair" and "inefficient" for this Court to stay the trial court's preliminary injunction, but accepting their argument would prevent a presumptively constitutional law enacted by the People from taking effect based on a legally flawed injunction. There is nothing fair or efficient about that. The State simply seeks a brief stay of the preliminary injunction until this Court can review its merits.

The authority of appellate courts to stay injunctions issued by trial courts has been recognized since statehood. *See, e.g., State v. Superior Court of Spokane County*, 28 Wash. 403, 68 P. 865 (1902). "[A] stay is simply available in the discretion of the appellate court, taking into

consideration the guidelines in RAP 8.1(3)(b)," namely "(1) whether the moving party can demonstrate that debatable issues are presented on appeal, and (2) a comparison of the injury that would be suffered by the moving party if a stay were not imposed, with the injury that would be suffered by the nonmoving party if a stay were imposed."2A Karl B. Tegland, *Washington Practice: Rules Practice* RAP 8.1 (8th ed. 2018).

Despite this clear authority, Respondents propose a standard that would effectively preclude an appellate court from ever staying a preliminary injunction. Respondents contend that the motion for an emergency stay is "premature" and inappropriately "truncate[s] the appeal process." Response at 12, 13. Respondents are wrong.

Respondents are wrong that this motion is premature. RAP 8.3 says that a stay can be granted "before or after acceptance of review," and is sought by filing a motion, as the State has done here. And under article II, section 1 of the Constitution, an initiative "shall be in operation on and after the thirtieth day after the election at which it is approved." Far from being premature, an emergency motion for a stay is the only viable means of ensuring compliance with this constitutional provision.

Respondents are also wrong that the emergency motion inappropriately truncates the appellate process. A stay is not a final assessment of success on appeal. *See, e.g., Cannabis Action Coalition v.*

City of Kent, 180 Wn. App. 455, 322 P.3d 1246 (2014) (Supreme Court Commissioner stayed the trial court's injunction requiring plaintiffs to comply with a city ordinance and transferred the appeal to the Court of Appeals, which ultimately upheld the ordinance). Thus, the State's emergency motion does not seek reversal of the preliminary injunction; it asks only that the injunction be stayed until this Court can review the underlying order.[1] Moreover, the accelerated briefing schedule is not a result of any subterfuge by the State, but rather that a preliminary injunction was issued just 8 days (4 court days) before I-976 takes effect. And despite Respondents' complaints of insufficient time, they drafted and filed a 47-page answer. It would be profoundly unfair to deny voters the fruits of their initiative merely because the parties to the litigation must comply with an abbreviated briefing schedule.

B. The Issues are at Least Debatable Because the Superior Court's Legal Errors Will Be Reviewed De Novo

Whether the superior court correctly issued a preliminary injunction is, at a minimum, debatable. While Respondents claim that the State cannot meet this standard because preliminary injunctions are generally reviewed for abuse of discretion, "[a] trial court necessarily abuses its discretion if its

[1] The merits of the underlying order are addressed in a statement of grounds for direct review and motion for discretionary review, which are both due 15 days after the filing of the notice of discretionary review. RAP 4.2(b), 6.2(b).

ruling is based on an erroneous view of the law." *Atwood v. Shanks*, 91 Wn. App. 404, 408-09, 958 P.2d 332 (1998) (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). Thus, even in reviewing an injunction, appellate courts review questions of law de novo. *See Rabon v. City of Seattle*, 135 Wn.2d 278, 287-94, 957 P.2d 621 (1998) (analyzing legal issues without deference and reversing preliminary injunction).

Here, two legal errors by the superior court are at least debatable: (1) the superior court erred in finding a likely subject-in-title violation under Article II, section 19; and (2) the superior court erred in determining the relevant time period for measuring the harm.

1. It is at least debatable that the superior court erred in its subject-in-title analysis

The superior court erred in concluding that Respondents were likely to succeed on the merits of their subject-in-title challenge because I-976's ballot title is not misleading and appropriately informed voters as to the subject matter of the initiative.

Respondents argue that the ballot title misled voters into believing (1) that the $30 limit applied to *all* kinds of vehicle taxes and fees, not just the "motor-vehicle-license fees" it actually said; and (2) that all "voter-approved charges in excess of $30 would be retained." Response at 26. But

the ballot title says neither of these things. The ballot title makes a clear distinction between "vehicle taxes and fees" generally in the first clause, and one type of fee in the second clause, "annual motor-vehicle-license fees," which are imposed and collected by the State. App. 305. As to only the more specific type of fee, and consistent with Sections 1 and 2 of the initiative, the ballot title informs voters that "annual motor-vehicle-license fees" are limited to $30, "except voter-approved charges." *Id*. This means that annual motor-vehicle-license fees, as defined and limited in Section 2, cannot exceed $30 unless voters approve amounts that exceed that limitation. Respondents claim that Section 2's definition of "annual motor-vehicle-license fees" includes and limits "local motor-vehicle-license fees," but as explained in the State's Motion for Stay at 12-13, there are not currently any "local motor-vehicle-license fees" in Washington, voter-approved or otherwise, so the use of "local" in Section 2 is best understood as a prophylactic measure.

The elimination of other vehicle-related taxes and fees is completely irrelevant to the $30 cap on "annual motor-vehicle-license fees." As set forth in the ballot title, only one type of vehicle-related taxes and fees—"annual motor-vehicle-license fees"—is subject to the $30 cap and the exception for "voter-approved charges." Additionally, the reference to "voter-approved charges" is not misleading just because there are no current

voter-approved "motor-vehicle-license fees." The fact that there were no voter-approved motor-vehicle-license fees before I-976 does not mean that such charges could not be voted on and imposed in the future. *See, e.g.*, Const. art. II, § 1.

Respondents' interpretation also fails to give due regard to the presumption of constitutionality afforded to initiatives and ballot titles. *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 654, 278 P.3d 632 (2012) (*WASAVP*) (discussing presumption "that an initiative is constitutional"); *Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995) (*WFSE*) (recognizing "a heavy burden . . . placed on one seeking to overcome the presumption"). This Court has recognized that ballot titles, like initiatives, must be construed in a manner that is constitutional when such a construction is possible. *WFSE*, 127 Wn.2d at 556. Here, it is entirely possible—and consistent with the ballot title's plain language—to construe "voter-approved charges" as a reference to future voter-imposed increases to motor-vehicle-license fees to be collected by the State under Title 46. Respondents did not meet their burden to show "palpable" and "grave" deception. *See WASAVP*, 174 Wn.2d at 661.

Finally with respect to the merits, it would be inappropriate for the Court to deny a stay based on Respondents' alternative constitutional

challenges to I-976. The superior court never addressed these claims, let alone found any of them likely to succeed on the merits. Those arguments are deeply flawed, as explained in the State's Response to Respondents' Motion for Preliminary Injunction. *See* App. at 451-72.

2. It is at least debatable that the superior court erred in granting an injunction based on distant and speculative claims of harm

It also is at least debatable that the trial court erred in issuing a preliminary injunction based on its assessment of harms to the parties in the coming years. In granting Respondents' motion, the trial court stated that "the relevant time period to evaluate and balance the respective harms to the parties is not merely the one or two months beyond December 5, 2019, that it might take for this Court to consider all parties' motions and issue a final ruling on I-976's constitutionality," but rather "the months or potentially years that it could take for all issues in the case to be addressed through appellate review." App. at 836-37. This was error.

In their response, Respondents double-down in support of this determination, arguing that "there is no requirement of imminent harm" to obtain a preliminary injunction. Pls.' Br. at 38. But this contention ignores the very nature of a preliminary injunction, an "extraordinary equitable remedy designed to prevent serious harm," *Kucera v. Dept. of Transp.*, 140 Wash.2d 200, 221, 995 P.2d 63 (2000), "until a full hearing on the merits

of the complaint can be held," *see generally* 15A Karl B. Tegland & Douglas J. Ende, *Wash. Prac.: Handbook Civil Procedure* § 73.6 (2018-2019 ed.).[2]

As the State previously established, the record does not support a determination that Respondents would face serious harm in the limited time it would take the court to decide the case on the merits. *See* Def.'s Mot. at 16-18; App. at 472-73. While Respondents continue to rely on the service hours King County Metro must purportedly cut by December 9, 2019, Pls.' Br. at 41, they do not dispute that they have reserve funds available that could be used to prevent these cuts, *see id.* at 8; *see also* App. at 432. And while they point to the $2.68 million in revenue the City of Seattle could lose in December if I-976 takes effect, they do not explain how this is a "serious harm," Pls.' Br. at 41, in relation to the City's $634 million annual transportation budget. App. at 486. Instead, Respondents' evidence is largely focused on speculative, long-term harms they would face in the coming years if they are unsuccessful on the merits of their claims. But such speculative claims of long-term harm and objections to the inconvenience of using reserve funds are insufficient to support a preliminary injunction..

[2] Federal courts are in accord. *See, e.g., Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) ("a plaintiff must *demonstrate* immediate threatened injury [for] preliminary injunctive relief").

See Tyler Pipe Indus., Inc. v. State, Dep't of Revenue, 96 Wn.2d 785, 794, 796, 638 P.2d 1213 (1982) (preliminary injunction does not protect a plaintiff from "speculative" injuries). Accordingly, the trial court's issuance of a preliminary injunction based on distant and speculative claims of harm presents a debatable issue.

C. The Balance of Harms Weighs In Favor of a Stay

The second RAP 8.1(b)(3) consideration involves a straightforward comparison of the potential injuries to the parties. On reply, there are three critical points. First, the relevant time period is of short duration. Second, Respondents dramatically undervalue the importance of the initiative power. And third, potential refunds threaten significant harm to the State.

In considering the magnitude of the injuries, this Court should consider only the short period that a stay would remain in effect. In this case, that would be until the earlier of a decision by this Court on the State's motion for discretionary review of the preliminary injunction or a decision by the trial court on the merits. The trial court retains full authority to act until this Court accepts review. RAP 7.1. Even after this Court accepts review, it may allow the trial court to consider summary judgment motions by the parties.[3] RAP 7.2(a), 8.3; *see also Stokes v. Bally's Pacwest, Inc.*,

[3] The State welcomes Respondents' commitment to prompt resolution and would invite Respondents' participation in a joint motion to permit the trial court to resolve the merits by summary judgment.

113 Wn. App. 442, 444, 54 P.3d 11 (2002).

In their answer, Respondents rely heavily on alleged harm from their inability to receive taxes and fees from the People and their inability to recoup those uncollected taxes and fees if I-976 is invalidated. But the importance of this temporary monetary loss pales in comparison to the harm that will occur to the People's confidence in the democratic process a "presumptively constitutional" initiative, *Pierce County*, 150 Wn.2d at 430, is blocked from taking effect without a valid legal reason. *See, e.g.*, *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005) ("The first power reserved by the people" is the initiative power.).

Finally, Respondents' contention that the State will suffer no harm if it has to pay refunds does not withstand scrutiny. Either Respondents cannot get by without spending the money they receive, in which case they will be unable to compensate the State for refunds the State must later pay, or Respondents are able to get by without spending this money, in which case their alleged harms are far less substantial than they currently suggest. They cannot have it both ways, and the trial court should not have shifted the risk of loss to the State.

III. CONCLUSION

For the foregoing reasons, this Court should grant the State's Motion for Emergency Stay Pending Review.

RESPECTFULLY SUBMITTED this 4th day of December 2019.

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s/ Kristin D. Jensen
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